No. 16002

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD ROBERTS, et al., *Appellants,*

vs.

FEDERAL CROP INSURANCE CORPORATION, *Appellee.*

Appeal from the United States District Court for the Eastern District of Washington Northern Division

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BRIEF OF APPELLEE

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Harold Roberts, et al., *Appellants,*

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Federal Crop Insurance Corporation, *Appellee.*

Appeal from the United States District Court for the Eastern District of Washington Northern Division

BRIEF OF APPELLEE

JURISDICTION

The appellants in their brief state that jurisdiction of the District Court and this Court is invoked under Title 7, U.S.C.A. 1506(d). Although the appellee does not attack nor question the jurisdiction of this Court,

it should be noted that the appellants' amended complaint, (R. 22), which the appellee moved against by Motion for Summary Judgment, sets out the statute upon which the appellants are claiming jurisdiction as being Title 7, U.S.C.A. 1508(*c*), the applicable portion of which is set out herein:

> ". . . In the event that any claim for indemnity under the provisions of this chapter is denied by the Corporation, an action on such claim may be brought against the Corporation in the United States district court, or in any court of record of the State having general jurisdiction, sitting in the district or county in which the insured farm is located, and jurisdiction is conferred upon such district courts to determine such controversies without regard to the amount in controversy: Provided, That no suit on such claim shall be allowed under this section unless the same shall have been brought within one year after the date when notice of denial of the claim is mailed to and received by the claimant."

ADDITIONAL STATEMENT OF FACTS

In order that the question involved may be better pointed out, an additional statement of the case will be summarized.

ADDITIONAL STATEMENT OF THE CASE

The plaintiffs are all farmers residing in Douglas County in the State of Washington (R. 3, 7, 18, 22, 55). Each of the plaintiffs had in force a Federal

Crop Insurance Corporation wheat crop insurance policy (Ex. A; R. 4, 7, 18, 22, 27, 55) insuring the policy holder against loss of his winter wheat crop by winter-kill (Ex. A; R. 12). Each of the plaintiffs was furnished (R. 28) a copy of the wheat crop insurance policy (Ex. A; R. 12, 13, 14, 15, 32 through 40).

On April 2, 1956, Ralph McLean, one of the individual plaintiffs, gave notice of probable loss to the Federal Crop Insurance Corporation (hereinafter called the Corporation) of wheat killed by winter-kill (R. 28). The record fails to reveal what reply, if any, Mr. Creighton Lawson, the Washington State Director for the Corporation, gave to Mr. McLean at that time, but in any event, Mr. Lawson was requested to be present at a meeting of Douglas County farmers in St. Andrews, Douglas County, Washington, on April 9, 1956 (R. 29). Mr. Lawson did not know any of the individuals present at the meeting other than Curt Clark, one of the attorneys for the appellants and some of the adjusters (R. 30).

The appellee's version of what Mr. Lawson said at the meeting (R. 29 and 30) and the appellants' version of what was said differ (R. 46, 47 and 54); however, Judge Driver, in granting summary judgment for the Government, took the plaintiffs' version of the facts as the true and correct one wherever there was a difference. (R. 55). The appellee, for purposes

of this appeal, accepts the appellants' version as set out in the appellants' brief, however, rejecting their legal conclusions. The appellants' version, in substance, is that Mr. Lawson was credited with saying that he was authorized to speak for the Corporation, and that should any claims be filed for winter-killed wheat they would not be paid by virtue of the provisions set out in Paragraph 4 of the insurance policy (R. 13), in that it was practical to reseed the wheat, further claiming that Creighton Lawson's conduct was ratified by Mr. C. A. Fretts, then acting manager of the Corporation.

None of the appellants has ever filed the Proof of Loss (R. 31, 59) as required by Paragraph 17 of the policy of insurance (R. 13).

On the basis of what Mr. Lawson said at the meeting of April 9, 1956, and the letter from Mr. C. A. Fretts addressed to appellants' attorneys (R. 51, 2, 3, 4), the appellants brought their action, basing their claim on the alleged fact that the Corporation had repudiated the contract of insurance (R. 24), claiming damages.

SUMMARY OF ARGUMENT

The Corporation moved for summary judgment in the District Court, alleging that it was entitled to a judgment as a matter of law on the grounds that there were no issues of any material fact. This motion was supported with an affidavit (R. 26 through 31), reflecting that none of the plaintiffs had complied with Paragraph 17 of the policy inasmuch as they had failed to furnish proofs of loss. The appellants did not file any counter affidavits reflecting that the proofs of loss were filed but defended the motion on the grounds that the Corporation, through Mr. Creighton Lawson and Mr. C. A. Fretts, denied liability and, therefore, the doctrine of estoppel should have necessarily been invoked against the Corporation on the grounds that the filing of the proofs of loss would have been a useless act.

It is the appellee's position that there are two salient reasons as to why the doctrine of estoppel should not be invoked against the Corporation and that the judgment of the District Court should be affirmed: (1) The alleged acts of the defendant Corporation's agents, Creighton Lawson and C. A. Fretts, which acts the plaintiffs allegedly relied on in their wilful failure to file their proofs of loss, were in direct contravention of all the applicable statutes and regulations. Therefore, the principle of law that

the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction, applies to this case.

(2) One of the requirements that a party must meet in order to invoke the doctrine of estoppel against another is that the person attempting to invoke estoppel shall be ignorant of the true facts. It is the appellee's position that the very language used in the policy of insurance, published in the Federal Register, sets out the requirements to be met and that the appellants should have been aware of the facts, or were negligent in failing to know them, as there existed ample opportunity and means of ascertaining the facts.

ARGUMENT

I

Should the Appellants' Allegation of Ambiguity in the Provisions of the Contract be Considered in the Determination of this Cause.

The appellants in their brief raised the question that ambiguity in an insurance contract must be interpreted in favor of the insured and against the insurer, citing cases to support this contention. The appellee does not dispute with nor object to this general statement of law but does contend that it should not be considered in the determination of this

appeal. Had the District Court not granted the summary judgment for the appellee then the question whether the contract was ambiguous would properly be before the Court. Judge Driver, in granting summary judgment for the appellee, did not grant the judgment on any question of ambiguity (R. 55 through 69) but based his opinion squarely on the proposition that the appellants failed to comply with the terms of the policy in failing to give proof of loss, and, further, that any acts of the Corporation's agents, allegedly relied on by the plaintiffs, were in contravention of the statutes and regulations, thereby prohibiting the appellants from invoking the doctrine of estoppel and waiver.

II

Does Estoppel Apply Against the Corporation, a Government Agency, Where Its Agents Committed an Act Which Contravened the Applicable Statutes and Regulations.

Accepting the appellants' version as to the course of conduct of the Corporation's agents, the question boils down to that as set out above.

The appellants posed the question succinctly in another manner on Page 4 of their brief by in effect asking the question whether a Government corporation which is engaged in the field of crop insurance is bound by the same set of rules which govern a

private company. *Federal Crop Insurance Corporation v. Merrill,* 332 U.S., 380, discussed later, clearly answers the question for the appellants.

In bringing this action the appellants relied on the general rules of insurance laws, that, if the insurer, during the period in which proofs of loss are to be made, denies liability, the insurer is deemed to be estopped from invoking or to have waived the right to demand proofs of loss. The appellee does not quarrel with this general principle of law in its application against private insurance carriers, however, it is the appellee's position that under the facts of this controversy and the principles of law the doctrine of estoppel or waiver does not apply to the Corporation, a government agency.

At the outset, it must be said that the Federal Crop Insurance Corporation is a Government agency within the United States Department of Agriculture (R. 57), by virtue of Title 7, Section 1503, U.S.C.A. *See Federal Crop Insurance Corporation v. Merrill, supra.* The form of the wheat corporation insurance policy which is the basis for this suit (Ex. A; R. 12, 13, 14, 15, 32 through 40) is prescribed in a federal regulation which has the force and effect of a statute, and constitutes legal notice of their contents, 44 U.S.C.A., 307. It was published in the Federal Register of September 21, 1951 (Vol. 16, No. 184, Page 9628, et seq) (R. 57).

There are three salient provisions of this contract of insurance which of necessity should be referred to. They are the same provisions that are contained in the policies that were furnished to all appellants (R. 28).

"14. *Notice of Loss or Damage.*

(a) If any damage occurs to the insured crop during the growing season and a loss under the contract is probable, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office promptly after such damage. (b) If a loss under the contract is sustained, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office within 15 days after threshing is completed or by October 31, whichever is earlier. (c) The Corporation reserves the right to reject any claim for indemnity if either of the notices required by this section is not given." (R. 13).

"17. *Proof of Loss.*

If a loss is claimed, the insured shall submit to the Corporation, on a Corporation form entitled "Statement in Proof of Loss", such information regarding the manner and extent of the loss as may be required by the Corporation. The statement in Proof of Loss shall be submitted not later than 60 days after the time of loss, unless the time for submitting the claim is extended in writing by the Corporation. It shall be a condition precedent to any liability under the contract that the insured establish the production of wheat on the insurance unit, the

amount of any loss for which claim is made, and that such loss has been directly caused by one or more of the hazards insured against by the contract during the insurance period for the crop year for which the loss is claimed, and that the insured further establish that the loss has not arisen from or been caused by either directly or indirectly, any of the causes of loss not insured against by the contract. If a loss is claimed, any wheat acreage which is not to be harvested shall be left intact until the Corporation makes an inspection." (R. 13).

The Proof of Loss form referred to in Paragraph 17 of the Insurance Policy is set out verbatim on R. 41.

"28. *Modification of Contract.*

No notice to any representative of the Corporation or the knowledge possessed by any such representative or by any other person shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right or power under such contract, nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation; nor shall any provision or condition of this contract or any forfeiture be held to be waived by any delay or omission by the Corporation in exercising its rights and powers thereunder or by any requirement, act, or proceeding on the part of the Corporation or of its representatives relating to appraisal or to any examination herein provided for." (R. 14).

This form of crop insurance policy explicity sets forth those standards that a claimant must adhere to in presenting a claim of loss. The policy requires two affirmative acts on the part of any person claiming compensation for losses, these acts being a condition precedent for any liability on the part of the Corporation. The claimant is required by the provisions of Paragraph 14 supra of the policy (R. 13) to give written notice of loss to the Corporation, and by the provisions of Paragraph 17 supra of the policy (R. 13) to submit Proof of Loss to the Corporation on a Corporation form.

These two affirmative acts required of a claimant are separate and distinct and serve different purposes: The Notice of Loss informs the company that the contingency insured against has occurred, while Proof of Loss supplies evidence of the particulars of the occurrence and information necessary to enable the insurer to determine its liability in the amount thereof. [R. 65, See Ballentine's Law Dictionary (1930); 45 C.J.S., sec. 981, sec. 982(1)a]. The giving of Notice of Loss does not dispense with the requirement that a Proof of Loss be submitted. (R. 65, *see Couch on Insurance,* Vol. 7, Sec. 1528; *Georgia Home Insurance Company v. Jones,* 135 S.W. 2d 947, 951.)

Case law relating to private insurance carriers reflects that in the absence of waiver or estoppel, there must be a substantial compliance with the require-

ment that written Proof of Loss be furnished to the Company. (R. 65, see *Wedgwood v. Eastern Commercial Travelers Acc. Ass'n,* 32 N.E. 2d 687; *Standard Acc. Ins. Co. v. Cherry,* 48 S.W. 2d 755; *Milton Ice Co. Inc. v. Travelers Indemnity Co.,* 71 N.E. 2d 232; *Brindley v. Firemen's Insurance Co. of Newark, N. J.,* 113 A. 2d 53, 35 N.J. Super. 1.)

As a question of fact, Mr. Lawson, an agent of the Corporation, did not nor does not have authority to either deny or approve a claim (R. 29). The record fails to disclose any affirmative showing by the appellants as to the extent of authority of Mr. Lawson. Going one step beyond this fact, the form of the policy, the extent and the limitations of the insurance coverage, the requirement as to Proof of Loss, and the reservations against waiver and estoppel are governed by regulations published in the Federal Register, supra. (R. 57). These regulations are specifically provided by statute, 7 U.S.C.A. 1516(b), the applicable portion set out herein:

> "The Secretary and the Corporation, respectively, are authorized to issue such regulations as may be necessary to carry out the provisions of this chapter."

In view of this it must be said that as a matter of law Mr. Lawson, the State Director, did not nor does not have the authority to either cancel or repudiate the insurance contract of the Corporation or have

authority to make any arrangement or commitment binding upon the Corporation which is contrary or not permitted by the governing statutes and regulations, and Mr. Fretts would certainly not have authority to ratify the acts of Mr. Lawson under these conditions.

The principle to be decided in this suit has been brought before the Courts on many occasions and the general principle was clearly enunciated in *United States v. San Francisco,* 310 U.S. 16, 32, and cited Cases:

> ' ". . . The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." '

The appellants in their brief distinguish three of the cases Judge Driver relied on in granting summary judgment for the Appellee, namely, *Felder v. Federal Crop Insurance Corporation,* 146 F. 2d 638; *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380; *Mock v. United States,* 183 F. 2d 174. The distinctions drawn by the appellants apply only to the particular factual situation and do not change the principles of law. These principles of law apply equally well to the facts in the instant case.

In *Mock v. United States,* 183 F. 2d 174, 10 C.A. (1950) the action also involved the Corporation as a defendant. The plaintiff furnished proper Notice of Loss to the Corporation, however, on specific recommendation from the adjuster, who in turn received his information from the County Administrator, the plaintiff failed intentionally to file Proof of Loss. The plaintiff's failure to file Proof of Loss was in reliance on the adjuster's statement. It is to be noted that in the particular contract of insurance, which also was published in the Code of Federal Regulations, there was a provision very similar to Paragraph 28 of the instant contract. (R. 14, Para. 28). The Court in holding for the Corporation held that it was no waiver, and, ignorance on the part of all concerned did not excuse the plaintiff from filing the Proof of Loss.

In *Felder v. Federal Crop Insurance Corporation,* 146 F. 2d 638, 640, 4th C.A. (1950), the Court also applied the general principle that the United States is not bound by acts of its officers or agents in doing something the law does not sanction. In this particular case the insured grower had not filed a Proof of Loss within the time required by the policy. The Court held that right of recovery was barred and that the requirements had not been waived by an action on the part of the County Committee.

The Court quoted Mr. Justice Holmes' oft-quoted statement which is set forth in *Rock Island, Arkansas and Louisiana Railroad Company v. United States,* 254 U.S. 141, 143:—

> "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. . . . At all events the words are there in the statutes and regulations and the Court is of the opinion that they mark the condition of the claimant's rights."

In *United States v. Shaw,* 137 F. Supp. 24, (N. Dak. 1956), which again was a case involving the Corporation, the Court, in granting judgment for the Government, once again invoked the principle that the insured was bound to know the limitations upon the authority of the agent or agents of a corporation in dealing with them.

Judge Driver, in rendering his Memorandum Opinion (R. 67, 68 and 69), succinctly set forth the issues involved in *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380; S. Ct. 1, 92 L. Ed. 10:

> "wheat growers in Bonneville County, Idaho, applied to the County Committee, acting as agent for the Corporation, for insurance on a crop of growing wheat. Although the Committee was correctly informed that 400 acres consisted of reseeded winter wheat acreage, it erroneously advised the growers that the entire crop was insurable, and upon its recommendation, the Corpor-

ation accepted the application. The crop was destroyed by drought, but the Corporation refused to pay the loss on the ground that the Wheat Crop Insurance Regulations did not authorize insurance on reseeded wheat and, hence, barred recovery as a matter of law. The Supreme Court sustained the contention and reversed the Court of Appeals which had affirmed the District Court. The following language of the opinion, I feel, is applicable in the instant case as well:"

" 'The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explic-

> itly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.' ". (pp. 383, 384) (R. 67, 68, 69).

There are a great number of cases setting forth the principle enunciated in *United States v. San Francisco,* supra, and this writer has been unable to find any cases deviating from this principle, however the writer has principally cited cases in this brief which involve the Federal Crop Insurance Corporation, which seemingly reflect the Court's attitude as applying to a Government agency engaged in the field of crop insurance.

III

Appellants Are Prevented From Invoking the Doctrine of Estoppel Against the Corporation by Virtue of Their Course of Conduct.

With relation to defining estoppel, this Court stated in *California State Board of Equalization v. Coast Radio Products,* 228 F. 2d, 520, 525 [9 C.A. (1955)]:—

> "Four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3)

the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

In commenting on point (3) the Court in *United States v. Shaw,* supra, on page 28 said:

> "Estoppel cannot be invoked by one who knew the facts or was negligent in not knowing them. Where facts were equally known to both parties, or are facts which the one invoking estoppel ought, in the exercise of reasonable prudence, to know, there can be no estoppel. *Froslee v. Sonju,* 209 Minn. 522, 297 N. W. 1, 3, 4; *Mescall v. W. T. Grant Co.,* 7 Cir., 133 F. 2d 209, 211.
>
> "Where the facts are equally known to both parties, there can be no estoppel; where both parties have equal means of ascertaining the facts, then, too, there can be no estoppel. *Uhlmann Grain Co. v. Fidelity & Deposit Co., of Maryland,* 7 Cir., 116 F. 2d 105, 109."

It should be noted that Paragraph 29 of the contract of insurance involved in the *Shaw* case, supra, at P. 26, is identical to Paragraph 28 of the policy involved in the instant case. (R. 14, Para. 28). The policy provision relating to "modification of contract" (Para. 28) is as follows:

> "*Modification of Contract.* No notice to any representative of the Corporation or the knowledge possessed by any such representative or by any other person shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right

> or power under such contract, *nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation;* nor shall any provision or condition of this contract or any forfeiture be held to be waived by any delay or omission by the Corporation in exercising its rights and powers thereunder or by any requirement, act, or proceeding on the part of the Corporation or of its representatives relating to appraisal or to any examination herein provided for." (Emphasis supplied) (R. 14).

Paragraph 17 of the policy (R. 13) entitled "Proof of Loss" makes its compliance a condition precedent to the Corporation's liability.

Each of the said appellants was furnished with a copy of the contract (R. 28) containing said provisions. The provisions were there to see and the appellants should be bound by them. Taking these facts and applying them to the law concerning estoppel, it could be concluded that the appellants were aware of the absolute necessity of compliance with the requirements of the policy of insurance, or were negligent in not knowing them, and by virtue of this should themselves be prevented from invoking estoppel as against the Corporation.

CONCLUSION

For the reasons set out herein, it is submitted that the Judgment of the United States District Court should be affirmed.

Respectfully submitted,

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